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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

JOHN JAKE KONSTANTINE JAKUBIK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-13a) is reported at ____ F.2d ____ The district court delivered two unreported oral opinions, relevant to the question presented (App. C & D, *infra*, pp. 15a-17a).

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1978. A petition for rehearing, and a suggestion for rehearing en banc, was denied on November 15, 1978 (App. B, *infra*, pp. 14a-15a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether property was obtained so that extortion within the meaning of the Hobbs Act, 18 U.S.C. 1951, was proven where the alleged victim, because of pressure wrongfully imposed, subcontracted for, and received, work for a price lower than it would have cost the alleged victim to do the work without subcontracting.

STATUTORY PROVISION INVOLVED

18 U.S.C. 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any

Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

STATEMENT

Petitioner Jakubik was charged in two counts of a five count indictment returned in the United States District Court for the District of Maryland, the court's jurisdiction being predicated upon 18 U.S.C. 3231. Both counts in which Jakubik was named charged violations of 18 U.S.C. 1951 (extortion) and 2 (aiding and abetting). The charges against Jakubik, then a building maintenance foreman for the Department of Education of the City of Baltimore, were joined with charges against George Santoni, then a member of the Maryland House of Delegates, who was named in all five counts of the indictment. After a joint jury trial, Jakubik was convicted on one count (Count Two) and acquitted on the other (Count Three) in which he was named. Both Jakubik and Santoni appealed and their appeals were joined under local rule 19 of the fourth circuit. The court of appeals affirmed both convictions.

In Count Two the alleged victim of the extortion was one Konstantinos "Gus" Nicolaidis and his company, The Olympos Painting Company. The "property" alleged to have been extorted was a subcontract which the alleged victim executed with Municipal Chemical Corporation, an investigatory device formed and funded as an undercover operation by the Federal

Bureau of Investigation to obtain evidence of kickbacks or other wrongs incident to local government contacts in Baltimore. In Count Two, the alleged extorters, Santoni and Jakubik, derived no benefit.¹

By pre-trial motion to dismiss, and by motions for judgment of acquittal at the close of the government's case, after all the evidence, and, again, post-trial, counsel for Jakubik preserved the issue presented to this Court. Petitioner's arguments were that Count Two did not properly charge extortion and that the Government did not prove it because there was no allegation or proof of loss to the victim, definable in monetary terms, in a case where the jury's acquittal of Jakubik on Count Three demonstrated that he got no benefit from the alleged extortion. The court of appeals, like the trial judge, rejected these pleas relying upon *United States v. Tropiano*, 418 F.2d 1069, 1075-6 (2d Cir. 1969), cert. den. 397 U.S. 1021 (1970). The court held that the property extorted was the right of the alleged victim to make a business decision free from outside pressure wrongfully imposed. See App., *infra*, p. 9a.

The facts relating to Count Two are a brief part of the entire record as well as the scheme portrayed about Santoni.² The alleged victim, Olympos, was awarded,

¹ The jury acquitted Jakubik of the charges in Count Three which were that he and Santoni got \$1600 from Municipal Chemical Corporation for obtaining the subcontract from Nicolaidis. By its verdict acquitting Jakubik of Count Three, the jury exonerated him of both aiding and abetting or actually extorting a payoff in connection with the subcontract which is the property alleged in Count Two.

² Santoni got \$3000 as an initiation fee from Municipal. That was the gravamen of Count One of which he was convicted. Santoni got \$1600 for assisting in getting the subcontract from Olympos to Municipal. That was the gravamen of Count Three of which Santoni was convicted. The jury acquitted Jakubik on Count Three. Santoni got \$16,000 from Municipal in regard to demolition work which was unrelated to the chemical cleaning matters. That was the gravamen of Count Four of which Santoni was convicted.

through competitive bidding, the chemical cleaning and restoration work on two Baltimore City schools. It was Olympos' first cleaning job. Municipal, the F.B.I. undercover operation, had a chemical cleaning expert, one Salvatore Spinnato, working with its principal undercover agents, Douglas Hodgson and Ronald Miller. Municipal paid off Santoni who sought to elicit a subcontract on the school restoration work for the benefit of Municipal. Santoni enlisted the aid of Jakubik. The Olympos president, Nicolaidis, met at least twice with Santoni and Jakubik. Nicolaidis was reluctant to subcontract with a company involving Spinnato whom he disliked. As the court of appeals noted, Jakubik introduced Santoni to Nicolaidis as a man who was worth knowing and who could be of help. After telling Nicolaidis not to deal with Spinnato if he did not want to, Jakubik told Nicolaidis about the importance of having relationships with a person who could help him. Olympos eventually subcontracted to pay \$16,000 for cleaning work on one of the two schools. Municipal, in fact, performed the work. Prior to entering into the subcontract, the original suggested price of \$32,000 was negotiated downward by Nicolaidis who also had his own lawyer draw the subcontract. The Government's bidding expert, Spinnato, testified, without contradiction, that Nicolaidis, the alleged victim, could not have done the work which Municipal did under the subcontract for the price paid to Municipal by the alleged victim. Moreover, the undercover F.B.I. agent, Hodgson, testified that, from the alleged victim's standpoint, the subcontract was both a "good business deal" and a "good contract". See, also, the trial judge's statement, App. D, *infra*, p. 17a.

In short, the proof demonstrated, at most, that the alleged victim subcontracted in response to the cajoling of Santoni and Jakubik. But, valuable services clearly were received by the alleged victim and no loss in monetary terms was proven.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals decides an important question of federal law which has not been, but should be, settled by this Court. Indeed, the decision below appears to be at odds with several decisions of this Court concerning the proper scope of the Hobbs Act. It is our submission that the decision below goes beyond any reported case and creates a potentially absurd precedent which should not be allowed to expand the reach of the Hobbs Act.

It is recognized, of course, that personal benefit to the alleged extortionist is not required under the Hobbs Act. *United States v. Enmons*, 410 U.S. 396, 411 (1973); *United States v. Green*, 350 U.S. 415, 420 (1956); *United States v. Trotta*, 525 F.2d 1096, 1098, n.2 (2d Cir. 1975), cert. den. 425 U.S. 971. However, in the absence of such benefit, the cases demand that there be a loss to the victim. For example, one court wrote: "one need receive no personal benefit to be guilty of extortion; the gravamen of the offense [of extortion under 18 U.S.C. 1951] is loss to the victim." *United States v. Hyde*, 448 F.2d 815, 843 (5th Cir. 1971), cert. den. 404 U.S. 1058.

In *United States v. Green*, 350 U.S. 415 (1956), the court ruled that an indictment sufficiently alleged an attempted extortion by charging that the defendants sought, from an employer, money in the form of "wages to be paid for imposed, unwanted, superfluous and fictitious services of laborers". The reach of that decision was only to property definable in monetary terms, i.e., the wages for services which returned no value to the employer.³ See *United States v. Enmons*,

³ Although *United States v. Trotta*, *supra*, holds that a defendant need not receive a benefit to be guilty of extortion, the thing extorted there was a money payment amounting to \$3,000 — clearly a monetary loss to the victim. *Trotta*, and other cases involving payments, therefore, do not address the issue of intangible losses or the statute's reach to such losses.

410 U.S. 396, 400, 408-10 (1973). In the case on which review is sought, however, the indictment did not allege, nor did the proof demonstrate, that the services under the subcontract were superfluous or fictitious. On the contrary, Nicolaidis got a good deal — actual work for a price he could not match. It should be noted that in *Green*, emphasis was placed on what the wages were being paid for, unlike the court below which deemed immaterial what the terms of the subcontract were.

In *United States v. Hyde, supra*, illicit payoffs to public officials came through “seemingly legitimate contracts” which were described as “shams”. 448 F.2d at 820. The contract device in *Hyde*, a sham, is obviously distinguishable from the subcontract in the case on which review is sought. Without “real value being purchased” the phony contracts in *Hyde* are like the superfluous and fictitious services in *Green*. Neither suggests that “loss of the victim” is an intangible “right” to do work without subcontracting it, as the prosecutors argued below.

Only two federal decisions have ruled explicitly that property under the Hobbs Act includes intangible property. *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973), cert. den. 411 U.S. 951; *United States v. Tropiano*, 418 F.2d 1069, 1975-6 (2d Cir. 1969), cert. den. 397 U.S. 1021. In each, the victim surrendered an opportunity and received nothing of value in return for that relinquishment. In both, the property extorted was the prospective loss of future business, without any benefit flowing to the victim. Neither, therefore, is precedent for the decision below.

Compare, *United States v. Glasser*, 443 F.2d 994, 1007 (2d Cir. 1971) where “direct financial harm” was the property extorted.

The decision below clearly treats *Tropiano*⁴ as binding authority. A review of the Second Circuit's opinion there, however, shows that the court there placed a monetary value on the prospective losses. The opinion states:

"Obviously, Caron [the victim] had a right to solicit business from anyone in any area without any territorial restrictions by the appellants and only by the exercise of such a right could Caron obtain customers whose accounts were admittedly valuable. Some indication of the value of the right to solicit customers appears from the fact that when the C & A accounts were sold for \$53,135, C & A's agreement not to solicit those customers was valued at an additional \$15,000. The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and

⁴ The opinion in *Tropiano*, treated three cases as precedent. Reliance on *United States v. Nedley*, 255 F.2d 359 (3d Cir. 1958), seems misplaced not only because that case involved robbery, not extortion, under the Hobbs Act, but also because, there, the court reversed the conviction, finding no "taking" on which to predicate a robbery.

Reliance on *United States v. Provenzano*, 334 F.2d 678 (3d Cir. 1964), is likewise curious because there Provenzano caused the victim to make payments of "substantial sums of money" to an attorney as a fictitious retainer, "a palpable cover-up device". 334 F.2d at 686. The payment of money is hardly an intangible loss. The services, moreover, were viewed as a "fraud". Whatever may be the proper perspective of the subcontract in the case on appeal, it was more than a cover-up device; actual valuable services were performed.

The court in *Tropiano* also cited *Bianchi v. United States*, 219 F.2d 182 (8th Cir. 1955), where, however, the intangible property was conceived as the economic losses which would flow from a wrongful strike. Economic injury was viewed as property; there was no compensating benefit.

It is to be noted that extortion may be committed by a federal official under 18 U.S.C. 872 only when he obtains money or something measurable in monetary terms. See, *United States v. Provinzano*, 50 F.R.D. 361, 365-6 (E.D. Wis. 1970).

Fourteenth Amendments of the Constitution. * * * (Citations omitted). Caron's right to solicit accounts in Milford, Connecticut constituted property within the Hobbs Act definition." 418 F.2d at 1076.

Neither *Tropiano* nor any other reported case holds that property is obtained within the meaning of the Hobbs Act by a mere showing that a business decision was wrongfully imposed, as the court of appeals held below.

Even in regard to labor activities which were the focus of the Hobbs Act, the broad scope of the Act does not reach, by the teaching of *United States v. Enmons*, 410 U.S. 396 (1973), to every act which may fall literally within the reach of the broad statutory language. In *Enmons*, the Court reasoned that illegal labor activity was within the reach of the Hobbs Act where an employer's property has been "misappropriated" through wage payments for superfluous and fictitious services of workers. The Court, however, refused to allow the Hobbs Act to reach labor violence when it was directed at "higher wages in return for genuine services which the employer seeks." *United States v. Enmons*, 410 U.S. at 400. While the violence in *Enmons* might be equated by some with bringing the parties to the subcontract here together and encouraging their agreement, it must be asserted that, by analogy, the alleged victim here, like the employer in *Enmons*, got genuine services. Moreover, the important point is that the Court in *Enmons*, as the Court in *Green*, see pages 6-7, *supra*, considered the end sought by the means to be material, not immaterial, as the court below here perceived.

18 U.S.C. 1951(b)(2) defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right". When the court below focused on the official role of the defendants and spoke of an alleged victim's right to a business decision

free from outside pressure wrongfully imposed, the focus only considered "wrongful use of official right" which is but one element of the statutory definition. No matter how wrongful the use of official right, the statute demands, by its terms, that property be obtained and there is no reported case which has defined property other than in terms of a benefit to the defendant, clearly not present here, or as a loss to the victim definable in monetary terms without compensating benefit to the alleged victim, also clearly not present here.

If the decision below is allowed to stand, a distinct extension of the Hobbs Act, without prior precedent, will have been articulated. It must be urged, respectfully, that the logical extension of this new precedent would create an absurdity. Carried to its limit, the decision would define an extortion even if an alleged victim paid only nominal consideration, say a dollar, for services and work worth much more, e.g., \$16,000 in this case. The loss to the victim concept, which has been at the heart of every extortion decision where no benefit has flowed to the defendant, will have been completely eroded without discussion of the Supreme Court cases which, at worst, are analogously relevant and without proper focus on the statute's separate and distinct elements.

CONCLUSION

For the foregoing reasons, it is respectfully submitted, that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

*United States Court of Appeals
For the Fourth Circuit*

No. 77-2006

United States of America,
v.
George Joseph Santoni,
Appellee,
Appellant.

No. 77-2007

United States of America,
v.
John Jake Konstantine Jakubik,
Appellee,
Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

Argued July 17, 1978 Decided October 19, 1978

Before BOREMAN and FIELD, Senior Circuit Judges, and HALL, Circuit Judge.

Harold I. Glaser for Appellant in No. 77-2006; M. Albert Figinski for Appellant in No. 77-2007; David Dart Queen, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney on brief) for Appellee.

FIELD, Senior Circuit Judge:

George Santoni and John Jakubik appeal from their convictions under 18 U.S.C. § 1951 (Hobbs Act),¹ following a joint jury trial. The appellants were joined under Rule 8(b) of the Federal Rules of Criminal Procedure and charged in a multicount indictment. Santoni was charged with violating 18 U.S.C. § 1951 (extortion) and § 2 (aiding and abetting) in Counts One through Four and with violating 26 U.S.C. § 7206(1) (tax evasion) in Count Five; he was convicted on Counts One through Four and acquitted on Count Five.

¹ 18 U.S.C. § 1951 reads in pertinent part as follows:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * *

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Jakubik was charged with violating 18 U.S.C. §§ 1951 and 2 in Counts Two and Three; he was convicted on Count Two and acquitted on Count Three. Both Santoni and Jakubik appeal, contending that there was an insufficient nexus with interstate commerce to support a conviction under the Hobbs Act. In addition, Jakubik argues that (1) "property" was not extorted within the meaning of the Hobbs Act, (2) it was reversible error for the trial court to deny his pre-trial motion for severance based on improper joinder under Rule 8(b), and (3) it was reversible error for the trial court to deny his Rule 14 motion for severance when only one day before the end of their joint trial Santoni stated that he would not take the witness stand.

This case centers around the federal government's attempt to uncover in the city of Baltimore a practice under which contractors were required to kick back a percentage of their contract fees to various officials in exchange for assurances of future contracts and the evasion of inspections during the performance of their contracts. As a part of this investigation, Municipal Chemical Corp. was organized in February, 1975, with the financial support of the F.B.I., for the specific purpose of obtaining evidence relative to political kickbacks and extortion incident to local government contracts in Baltimore. Although the realization of profit was not a primary goal of Municipal Chemical, the corporation was designed to acquire and perform contracts in the field of chemical cleaning and building demolition while pursuing its undercover activity. Salvatore Spinnato was hired to work in cooperation with the F.B.I. as a paid consultant to Municipal Chemical, and was the only person in the corporation familiar with chemical cleaning. F.B.I. agents Dudley Hodgson and Ronald Miller acted as officers of Municipal Chemical. During the period covered by the indictment, appellant Santoni was a member of the Maryland House of Delegates and had been assisted in his election effort by appellant Jakubik who was a building maintenance foreman for the city of Baltimore.

In May of 1975, Olympos Painting Co. acquired a contract to clean two public schools in the Baltimore area. Later in that spring Spinnato informed Santoni, whom he had known previously, that he was involved with Municipal Chemical and that it had bid unsuccessfully on the cleaning contract awarded to Olympos Painting. Santoni informed Spinnato that he could help Municipal Chemical but that it would cost ten percent of all contract fees plus an initiation fee of \$3,000. Spinnato paid Santoni the \$3,000, and Santoni advised him that he could obtain a subcontract for Municipal Chemical from Olympos Painting. Jakubik arranged for a meeting between Santoni and Konstantinos Nicolaidis, president of Olympos Painting, at which meeting Santoni was introduced by Jakubik, according to Nicolaidis' testimony, as "a state delegate [who] can help you if you ever have a problem * * *. And it is good to have a friend like this * * * on account of [Santoni's] being a politician and state delegate." At this meeting Santoni requested that Olympos Painting give Municipal Chemical a subcontract to clean one of the two Baltimore schools, but Nicolaidis was reluctant to enter into such an arrangement.

At a subsequent meeting Santoni, Jakubik, Spinnato, Hodgson, Miller and Nicolaidis discussed the possibility of a subcontract for Municipal. After Nicolaidis refused Municipal Chemical's offer to perform the work for \$32,000, according to Nicolaidis' testimony, Jakubik reminded Nicolaidis "about he knowing people, that they can help contractors, that it's good to have these people as friends, and sometimes you couldn't afford to have them against you." During this same meeting, Santoni informed Nicolaidis that there would be no trouble with inspectors. Nicolaidis subsequently agreed to award the subcontract to Municipal Chemical at the price of \$16,000 because, according to his testimony, "I thought I was getting into or associating with people that would be helping me in future contracts." On July 21, 1975, after signing and delivering the subcontract to

Nicolaidis, the principals of Municipal Chemical paid Santoni \$1,600 to cover the ten percent kickback fee.

In the performance of its subcontract, Municipal Chemical used Hydron 300, a chemical manufactured in Pennsylvania, as expressly required by the original contract. In addition Municipal Chemical rented power scaffolding and accessories from Sky-Climber, Inc., of California. After completing its work under the subcontract, Municipal Chemical sold 55 gallons of Hydron 300 to Nicolaidis for use by Olympos Painting in completion of the contract.

About the time the school subcontract was being completed, Santoni informed Spinnato that it would cost Municipal Chemical \$10,000 for his assistance in the acquisition of demolition contracts, and agent Hodgson paid Santoni the amount requested by him. In February of 1976, approximately one year after its formation, Municipal Chemical Corp. was forced to terminate its operations because Spinnato's undercover activity had been revealed.

INTERSTATE COMMERCE

Counts One through Three were based upon the chemical cleaning contract and subcontract while Count Four involved the attempt to acquire demolition contracts. With respect to the chemical cleaning contract and subcontracts, appellants argue that (1) the government created the only connection with interstate commerce and thus manufactured the jurisdictional requirement, and (2) Municipal Chemical was only a "one shot deal" and thus there was no real effect on interstate commerce as a result of appellants' activities. We do not agree and conclude that the requisite nexus with interstate commerce under the Hobbs Act was established in Counts One through Three.

Appellants contend that Municipal Chemical, the government created corporation, provided the only connection with interstate commerce by making purchases of Hydron 300 and renting scaffolding, both of

which were manufactured out-of-state. They argue that the logical extension of holding that the interstate commerce jurisdictional element was met in such fashion would permit the government to assume federal jurisdiction over purely state criminal cases by manufacturing a nexus with interstate commerce. In making this argument the appellants rely strongly on *United States v. Archer*, 486 F.2d 670 (2 Cir. 1973), which involved 18 U.S.C. § 1952 (Travel Act), making it a federal crime to use any facility in interstate commerce to carry on an illegal activity. In *Archer* the only connection with interstate commerce consisted of interstate phone calls initiated by a government agent for the express purpose of creating jurisdiction, with the exception of one transcontinental call which the court discarded as "a casual and incidental occurrence." *Id.* at 682. The Second Circuit expressed its disapproval of the government's methods of uncovering the illegal activity and its attempts to create jurisdiction. While the conviction was reversed, upon rehearing the court narrowed its holding to those cases where the interstate commerce element "is furnished solely by undercover agents." *Id.* at 685-86. The Second Circuit's subsequent decision in *United States v. Gambino*, 566 F.2d 414 (1977), appears to further restrict *Archer*. In *Gambino* the F.B.I. had organized a sanitation collection company in an effort to uncover extortionate pressure being placed on similar companies by the defendants. The only connection with interstate commerce was the government's out-of-state purchases of equipment, and dumping of garbage in New Jersey because of cheaper rates. The court distinguished *Archer* by noting that it involved the contrived use of interstate facilities whereas in *Gambino* "the activities of [the government corporation] were necessarily wedded to interstate commerce." 566 F.2d at 419 (emphasis added). In our opinion the present case is distinguishable from *Archer* and falls within the rationale of *Gambino* since the contract with the city required the use of Hydron 300. Regardless of who performed the work on the two

Baltimore schools, interstate commerce would have been involved in the cleaning process by this required use of Hydron 300. In addition the rented scaffolding, manufactured out-of-state, was a *necessary* part of the cleaning process. Appellants' reliance on *Archer* is further undercut by our decision in *United States v. LeFaivre*, 507 F.2d 1288 (4 Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975), where we concluded that the interstate requisite of the Travel Act is satisfied if there is "some utilization of a facility in interstate commerce and it is not requisite that such use be substantial or integral to the operation of the illegal enterprise." *Id.* at 1299.

Appellants further rely upon *United States v. Yokley*, 542 F.2d 300 (6 Cir. 1976), where the court placed a restrictive construction upon the Hobbs Act, observing that the government's interpretation of the statute "would encompass literally any armed robbery occurring in any state." *Id.* at 304. The approach of the court in *Yokley* however, was rejected in *United States v. Culbert*, — U.S. —, 46 U.S.L.W. 4259 (March 28, 1978), where the Supreme Court stated:

With regard to the concern about disturbing the federal-state balance, moreover, there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law. The legislative debates are replete with statements that the conduct punishable under the Hobbs Act was already punishable under state robbery and extortion statutes. * * *

Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language.

Id. at 4261. The fact that the present convictions may also constitute state criminal offenses is thus immaterial for our purposes provided that there was a sufficient nexus with interstate commerce to satisfy the Hobbs Act.

The appellants contend that Municipal Chemical was a "one-shot deal" and, accordingly, there was no effect on interstate commerce. In making this argument they rely primarily upon *United States v. Merolla*, 523 F.2d 51 (2 Cir. 1975), and *United States v. Elders*, 569 F.2d 1020 (7 Cir. 1978). In our opinion, however, the continuing nature of Municipal Chemical's activity and its use of material which necessarily traveled in interstate commerce is sufficient to distinguish the present case from those cited by appellants. Of further significance on this point is the fact that Municipal Chemical had no intention of ceasing operations following performance of the cleaning contract, and it was only when Spinnato's undercover activity had been revealed that it terminated its operations.

Santoni also challenges Count Four, contending that the government failed to offer any evidence of interstate transactions connected with the proposed demolition contract. In our opinion, however, Santoni's argument on this point is answered by our decision in *United States v. Spagnolo*, 546 F.2d 1117 (4 Cir. 1976) (per curiam), *cert. denied*, 433 U.S. 909 (1977), where we elected to place a broad construction upon the Hobbs Act, stating "all that is required to bring an extortion within the statute is proof of a reasonably probable effect on commerce, however minimal, as a result of the extortion." *Id.* at 1119. The defendants in *Spagnolo* had forced the victim, under threat of physical harm, to execute a sale of his interest in a construction firm which received most of its materials through interstate commerce and, additionally, required him to pay to the defendants the sum of \$1500. We noted that the withdrawal of the victim was reasonably calculated to reduce the funds necessary to purchase materials in interstate commerce, and that the defendants' conduct in forcing him to sell his interest in the firm satisfied the interstate commerce requirements.

In our opinion Santoni's conduct in extorting \$10,000 from Municipal Chemical with respect to the demolition

contracts parallels that of the defendants in *Spagnolo*. In each instance, interstate commerce was affected by the extortion of funds which otherwise might reasonably have been expected to be channeled into the purchase of material in interstate commerce.

PROPERTY

Jakubik urges upon us that his conviction under Count Two cannot stand because "property" was not extorted within the meaning of the Hobbs Act. He argues that the property alleged to have been extorted was the subcontract, and that in the absence of benefit to the extortionist the Hobbs Act requires some loss to the victim; that since the subcontract was entered into for valuable consideration, there was no loss to Olympos Painting.

Extortion under the Hobbs Act does not require a direct benefit to the extortionist, *United States v. Green*, 350 U.S. 415, 420 (1956); "[t]he gravamen of the offense is loss to the victim," *United States v. Frazier*, 560 F.2d 884, 887 (8 Cir. 1977), and such loss includes intangible as well as tangible property. *United States v. Nadaline*, 471 F.2d 340, 344 (5 Cir. 1973), *cert. denied*, 411 U.S. 951 (1973); *United States v. Tropiano*, 418 F.2d 1069, 1075-76 (2 Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). In *Tropiano* the defendants were partners in a refuse removal company known as C & A. When Caron Refuse Removal, Inc., replaced C & A in servicing some of C & A's customers, the defendants by threats of violence forced Caron Refuse to cease further attempts to acquire C & A's customers and to consent not to solicit any more business in that area. The Second Circuit held that the property extorted was the right of Caron Refuse to solicit business free of territorial restrictions wrongfully imposed by its competitors. 418 F.2d at 1076. We agree with the government that here, as in *Tropiano*, the property extorted was the right of Olympos to make a business decision free from outside pressure wrongfully imposed, and this is sufficient to sustain the convictions on Count Two.

PRE-TRIAL MOTION FOR SEVERANCE

Jakubik contends that under the standards set forth in Rule 8(b) of the Federal Rules of Criminal Procedure,² he and Santoni were improperly joined in the indictment. If the defendants were improperly joined under Rule 8(b), severance was, of course, mandatory and not a matter of discretion with the trial court. *United States v. Marionneaux*, 514 F.2d 1244, 1248 (5 Cir. 1975); *Ingram v. United States*, 272 F.2d 567, 569-70 (4 Cir. 1959); 8 Moore's Federal Practice ¶ 8.04[2] (2d ed. 1977). On the other hand, if joinder was proper the trial court was permitted to exercise its discretion in determining whether or not to proceed with a joint trial. *Ingram v. United States*, *supra*, at 569-70; see *United States v. Whitehead*, 539 F.2d 1023 (4 Cir. 1976). The test for joinder under Rule 8(b) is whether the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions." Where the defendants' acts are part of a series of acts or transactions, it is not necessary that each defendant be charged in each count, nor to show that each defendant participated in every act or transaction in the series. *United States v. Scott*, 413 F.2d 932, 934-35 (7 Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970); 1 C. Wright, Federal Practice and Procedure § 144, at 324 (1969). Although "series of acts or transactions" is not defined in the Rule, such phrase logically includes those transactions so interconnected in time, place and manner as to constitute a common scheme or plan. *United States v. Jackson*, 562 F.2d 789, 796 (D.C. Cir. 1977); *United States v. Scott*, *supra*. The series of acts engaged in by Santoni and Jakubik constituted a

² Fed. R. Crim. P. 8(b) provides:

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

scheme or plan of extortions through the wrongful use of fear of financial injury and under color of official right. Although Jakubik was not charged in Count Four relative to the demolition contract, it is clear that the charge under Count Four was part of the series of extortions involving the officers of Municipal Chemical and engaged in by Jakubik and Santoni. Count Five involved a charge against Santoni of tax evasion due to his failure to report the income extorted from Municipal Chemical. Thus it, too, was part of the series of acts engaged in by the defendants since such evasion was necessary to conceal the extortionate activity. Accordingly, joinder was proper, and the trial court did not err in proceeding with the joint trial of Santoni and Jakubik.

RULE 14 MOTION FOR SEVERANCE

Near the end of their joint trial Santoni indicated for the first time that he would exercise his Fifth Amendment privilege not to testify. After being apprised of Santoni's intention, Jakubik moved for a severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure.³ Jakubik contends that he expected Santoni to testify in their joint trial because counsel for Santoni so indicated during his opening statement. Incident to his motion, Jakubik proffered that if he was granted a severance, Santoni would testify in Jakubik's separate trial that (1) Jakubik's involvement in the extortion was purely a political favor to Santoni; (2) Jakubik exaggerated his political importance; (3) Jakubik received none

³ Fed. R. Crim. P. 14 provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

of the money which passed from Municipal Chemical to Santoni; (4) Jakubik never threatened anyone nor engaged in any effort to extort anything; and (5) Jakubik had no knowledge of the extortionate activity. Santoni's counsel agreed that Jakubik's proffer accurately reflected what Santoni would testify to in a separate trial.

The grant or denial of a motion for severance under Rule 14 lies within the sound discretion of the trial court and its action on such a motion will be overturned only when there has been a clear abuse of such discretion. *United States v. Gay*, 567 F.2d 916, 919 (9 Cir. 1978); *United States v. Jamar*, 561 F.2d 1103, 1106 (4 Cir. 1977). The trial court must weigh the inconvenience and expense to the government and witnesses of separate trials against the prejudice to the defendants inherent in a joint trial, and its determination will not be disturbed unless the denial of a severance deprives the movant a fair trial and results in a miscarriage of justice. *United States v. Walsh*, 544 F.2d 156, 160 (4 Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977); *United States v. Frazier*, 394 F.2d 258, 260 (4 Cir. 1968), *cert. denied*, 393 U.S. 984 (1968). The movant must show something more than merely a better chance of acquittal and "must overcome the burden imposed by a stringent standard of review." *United States v. Jamar, supra*, at 1106.

Jakubik relies principally upon our decision in *United States v. Shuford*, 454 F.2d 772 (4 Cir. 1971). In that case, however, the testimony of his codefendant was crucial to Shuford's defense and was unavailable from any other source. In holding that a severance should have been granted, we recognized the unique factual setting of the case, stating:

We reach this conclusion, aware of the vital importance of Jordan's testimony to Shuford's defense, and in light of the substantial expectation that Jordan, if severance were granted, would indeed testify as indicated. We emphasize that our approach in this case does not mandate a severance in every situation where one defendant

desires the testimony of another. We hold only, on the specific facts of this case, that Jordan's testimony took on unusual importance for Shuford's defense; that this testimony could become available only by severance; and that in these circumstances it was reversible error to deny Shuford's motion. (Footnote omitted).

Id. at 779. The factual setting which supported the motion in *Shuford* differs significantly from Jakubik's case for Santoni's proffered testimony lacks the degree of exculpation which was present in *Shuford*. Testimony that Jakubik's involvement was purely political and that he exaggerated his political importance had no bearing upon the Hobbs Act violation, and the other items in the proffer were largely conclusory and had less than a pivotal bearing upon Jakubik's guilt or innocence. Under these circumstances, we cannot say that the trial court abused its discretion or that Jakubik was denied a fair trial by the denial of his motion.

The judgments of conviction are affirmed.

Affirmed.

APPENDIX B

CORRECTED

*United States Court of Appeals
For The Fourth Circuit*

No. 77-2006

Stamped as
Filed
Nov. 15, 1978
William K.
Slate, II,
Clerk.

United States of America,

Appellee,

v.

George Joseph Santoni,

Appellant.

No. 77-2007

United States of America,

Appellee,

v.

John Jake Konstantine Jakubik,

Appellant.

ORDER

Upon consideration of Jakubik's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc in case no. 77-2007,

It is ADJUDGED AND ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Field for a panel consisting of Judge Boreman, Judge Field, and Judge Hall.

For the Court,

/s/ WILLIAM K. SLATE, II,
Clerk.

APPENDIX C

* * * * *

Transcript, February 24, 1977, p. 13-15, Northrop, C.J.

And another thing that Jakubik argues is the Section 1951 definition of extortion requires that property be wrongfully obtained from another, quote, while count two merely alleges that a subcontract was obtained making no allegation that said subcontract was a sham, or that good and valuable services were not performed thereunder or that the victim suffered any loss. Close quote.

The Defendant is thus, in reality, arguing (1) that no property was obtained from the alleged victim, and (2) that even if a subcontract is deemed to be property within the meaning of the Hobbs Act, it was not wrongfully obtained if the subcontractor did, in fact, provide valuable services.

This Court is of the opinion that both these arguments must fail. The concept of property under the Hobbs Act, as evolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered as a source or element of wealth and does not depend upon a direct benefit being conferred upon the person who obtained the property. U.S. v. Tropiano, 418 F.2d 1069, 1075-76 (Second Circuit 1969), cert. denied, 397 U.S. 1021 (1970).

A contract is surely such a valuable right. As to defendant's contention that the contract was not wrongfully obtained in that no allegation was made that said subcontract was a sham, this Court would remind defendant that it is he who has been indicted for extortion, not the subcontractor. In order to prove extortion, the Government must establish that the extortionist had no lawful claim to the property. *United States v. Enmons*, 410 U.S. 396, 399-400 (1973); *United States v. Quinn*, 514 F.2d 1250, 1256 (Fifth Circuit 1975).

The defendant is accused of securing the subcontract for another as part of a scheme of extortion. Regardless of whether the subcontractor was ultimately to deliver valuable services, the Government has properly alleged that the extortionist had no lawful claim to the property obtained.

The motion to dismiss must accordingly be denied, and you will draw such an order, -counsel for the Government.

APPENDIX D

* * * * *

Transcript, June 17, 1977, p. 1542-1543, Northrop, C.J.

THE COURT: Now, of course, the defendant Jakubik has argued to the Jury and again on these motions that the evidence does not support a finding that Mr. Nicolaidis was the victim of any extortion, and that, as I have just asked counsel, is the real gravamen of his argument here in reference to the motion for judgment of acquittal. So far as Jakubik is concerned.

He has pointed out that Mr. Nicolaidis drove a hard bargain, and ultimately subcontracted work to Municipal on terms which were profitable to him. Although this is essentially a factual question, the Court feels compelled by the frequency and vigor with which it has been raised to speak to this issue.

The simple, though perhaps regrettable, fact is that illicit business is frequently carried on in a fashion not unlike any other transaction. Sometimes you lose and sometimes you gain.

The evidence tended to show that Mr. Nicolaidis was compelled to part with something of value, that is, a building cleaning subcontract. That he endeavored to part with this property right on terms as favorable to himself as possible is a factor which the Jury could properly consider, but it is not necessarily inconsistent with a finding that he was the victim of extortion.

In light of the foregoing analysis, I would certainly deny the motion in reference to judgment of acquittal, and do so.